



**Kaluworks Limited v Mkala (Appeal 10 of 2019)  
[2023] KEELRC 1405 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1405 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL 10 OF 2019**

**M MBARŪ, J**

**JUNE 8, 2023**

**BETWEEN**

**KALUWORKS LIMITED ..... APPELLANT**

**AND**

**MWATUMBI MARADI MKALA ..... RESPONDENT**

**RULING**

1. The respondent, Mwatumbi Maradi Mkala filed application dated February 6, 2020 under the provisions of Section 1A and 3A and Rule 29(1)(b) and (2) of the [Court of Appeal Rules, 2010](#) and seeking for orders that he be granted leave to introduce further evidence in the form of his affidavit sworn on February 21, 2020 in support of his position as far as the appellant's appeal is concerned and that he should be allowed to cross-examine the respondent on the contents of the sworn affidavit.
2. The application is supported by the Supporting Affidavit of the respondent and on the grounds that;
  - a. The respondent's affidavit sworn on February 21, 2020 will lay the issue of the present appeal to rest and in so doing assist this court to determine this appeal *in limine*.
  - b. It is in the interest of justice and valuable judicial time that the respondent's affidavit sworn on the 21st February 2020 be admitted into this court as further evidence in the present appeal.
  - c. It would serve best the interests of justice if this application was allowed.
3. In his affidavit, the respondent aver that for the appeal to be heard on the merits, the affidavit sworn on February 21, 2020 be admitted in evidence before this court so that the court can be fully appraised of the full facts of the present appeal so as to enable the court delivery justice as by law required. He stands to lose the fruits of 11 years of labour which he dedicated to the appellant. The respondent has always been desirous to prosecute his claim against the respondent to conclusion and for these reasons the application before court be allowed.



4. In reply, the appellant filed the Replying Affidavit of Hezron Rachilo the human resource consultant and who aver that parties attended court on April 20, 2023 wherein the advocates submitted that there was a settlement of the matter with respect to Mombasa Cause No 441 of 2018 between Evans Furaha Onesmus & Anne Anyango Nyabondo, Nicholas Hamini Katana, Mwatumbi Mradi Mkala and Andrew Mutisya Isika v Kaluworks Limited and the court directed the respondent to file the consent marking the matter as settled. In Cause No 441 of 2018, the settlement of July 20, 2022 was when the court adopted the consent dated July 1, 2022.
5. The matter having been settled, it will not serve justice to engage in further proceedings with respect to this matter or before the trial court in Mariakani SRMCC No 262 of 2018 – Mwtumbi Mradi Mkala v Kaluworks Limited. The appeal was based on the grounds that the suit before the trial court was sub judice and offended the provisions of Section 6 of the *Civil Procedure Act* which position has in the circumstances of the subject settlement changed to res judicata contrary to Section 7 of the *Civil Procedure Act*. if the matter is allowed to proceed while there is a settlement by consent, the respondent if successful will benefit twice and embarrass the court and cause injustice and the application should be dismissed with costs.
6. Both parties attended and made oral submissions.
7. The respondent as the applicant submitted that the respondent is seeking the court to admit his affidavit as part of the court record and due to the fact that he never instructed his former advocates to file suit unless he is allowed to rely on this affidavit in this appeal, he will be prejudiced and denied justice.
8. In response, the appellant submitted that Under Order 42 and rule 27, a party is allowed to introduce new evidence on appeal but must respond to the question whether the trial court had the chance to address that evidence. The respondent was aware of Cause No 441 of 2018 as being sub judice and he did not raise such matter and what he seeks to introduce is not new evidence but matters he was well aware of after serving the pleadings. The matter is now settled and the respondent paid in full and to re-open the case would mean the respondent will be heard twice on the same matter which will defeat the course of justice and hence the matter is res judicata.

### **Determination**

9. The main appeal herein relates to the ruling of the SRMCC at Mariakani on May 2, 2019 in Case No 262 of 2018 on the grounds that the appellant herein was dissatisfied with the ruling of the trial court on the finding that the issue at hand was not sub judice following the preliminary objections dated October 17, 2018. Following the trial court's ruling on May 2, 2019 the parties have gone ahead to file a consent settling the matter. The consent was adopted by the court on July 1, 2022. The matter having been settled, this appeal became spent.
10. With regard to whether the court should allow the introduction of new evidence on appeal, Section 78(1) of the *Civil Procedure Act* affords an appellate court discretion to take additional evidence. This is what that section provides:-
  - "(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power: -
    - a) To determine a case finally;
    - b) To remand a case;



- c) To frame issues and refer them for trial;
- d) To take additional evidence or to require the evidence to be taken;"

11. In addressing the question whether to allow additional evidence on appeal or not, the Supreme Court gave the general principles in the case of *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamed & 3 Others* [2018] eKLR and held that;

"We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- (a) The additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- (b) It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- (e) The evidence must be credible in the sense that it is capable of belief;
- (f) The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- (g) Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- (h) Where the additional evidence discloses a strong prima facie case of wilful deception of the Court;
- (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
- (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
- (k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."

12. These principles put into perspective, the issue at the core of the appeal rendered moot by the fact of settlement of the subject matter in question and ruling of the trial court on May 2, 2019 there being no cross-appeal, the purpose of the new evidence will not have any foundation.



13. The respondent does not challenge the fact that he was a party in Cause No 441 of 2018 SRMCC at Mariakani and that there is settlement and payment.
14. The change of advocates is not sufficient cause to introduce new evidence in this appeal which matter ought and should have been addressed before the trial court first and if not, where an advocate acted against client's best interests, recourse lies outside this appeal. Where employment was terminated on 6<sup>th</sup> movement, 2017 the respondent asserts that he proceeded to instruct the firm of Oduor Opalo & Company Advocates to file suit to recover damages from the appellant and Mariakani Cause No 262 of 2018 was filed but he later learnt that Cause No 441 of 2018 had been filed but does not state he is a beneficiary out of the latter cause where there is a settlement.
15. On the principles outlined above, the settlement for the parties addressed under SPMCC No 441 of 2018 at Mariakani, the appeal is moot and to allow additional evidence in his appeal will not achieve justice.
16. Application dated February 6, 2020 is overtaken by consent dated July 1, 2022 and adopted as an order of the trial court. This appeal is spent. Each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 8<sup>TH</sup> DAY OF JUNE, 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Rahma ..... and .....

